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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| UNION PACIFIC RAILROAD COMPANY,<br>Plaintiff and Appellant,<br>v.<br>SANTA FE PACIFIC PIPELINES, INC., et al.,<br>Defendants and Respondents. | A103990<br><br>(San Francisco County Super. Ct. No. 963433) |

After two trials to determine the fair rental value of extensive noncontiguous pipeline easements, the trial court entered a second judgment for an amount that was not substantially larger than the amount of the first judgment. The party which granted the easements asks for a complete reversal with the chance for a third trial. We decline to reverse the judgment in its entirety, but do reverse the portion of the judgment that establishes the width of Line Section 16 in Contra Costa County. In all other respects we affirm the judgment.

## I. FACTUAL BACKGROUND

Union Pacific Railroad Company (UP or the railroad), successor to Southern Pacific Transportation Company (SPTC), operates the largest railroad in North America. Since the mid-1950's, Santa Fe Pacific Pipelines, Inc. (SFPP) and its predecessor have had the contractual right to install pipelines along the railroad's right-of-way, with provision for creation of pipeline easements on the right-of-way

property. At that time, the railroad and the predecessor of SFPP were sister subsidiaries of Southern Pacific Corporation. In 1983 the railroad granted the pipeline company perpetual, nonexclusive easements and the right to build and operate underground hydrocarbon pipelines on the railroad's rights-of-way. The 1983 agreement set forth the rents to be paid for existing pipeline easements through 1993. Around that time the parties' status as sister subsidiaries also ended. (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1235 *(Southern Pacific I*).)

Approximately 1,871 miles of pipeline run through California, Arizona, Nevada, New Mexico, Texas and Oregon within UP's right-of-way. Another 1,400 miles or so of pipeline veer off intermittently into public and private lands. Easements are recorded in 42 counties. In all, there are 1,076 pipeline segments; some are contiguous, others are not.

In 1991 UP sued SFPP and related entities, alleging, among other points, that the pipeline easement rents were artificially low. That lawsuit settled in 1994. As to future rent, the agreement stated: " 'Beginning January 1, 1994, and every ten (10) years thereafter, SPT may seek an increase of rent to fair market value. . . . If the parties hereto are unable to agree upon the amount of the rent increase, if any, for any such ten (10) year period on or prior to the commencement date of any ten (10) year period, then upon request of either party the parties shall within 30 days thereafter enter into a stipulation pursuant to Rule 244.1 of the California Rules of Court for an order directing a judicial reference proceeding . . . by a single referee . . . to establish the amount of such rent increase in accordance with the fair market value of the easement.' "

The railroad commenced this action in August 1994. Thereafter, rather than proceeding by way of judicial reference under California Rules of Court,[1] rule 244.1, the parties stipulated to the appointment of the Honorable Christian E. Markey, Jr.,

[1] All references to rules are to the California Rules of Court.

retired, to serve as a temporary judge pursuant to rule 244 and article VI, section 21 of the California Constitution. The matter went to judgment, with the court setting the " 'fair market rent' " of the pipeline easements at $5 million a year as of January 1, 1994, inclusive of the " ' "Alameda Corridor," ' " which was later sold. (*Southern Pacific I*, *supra*, 74 Cal.App.4th at p. 1239.) The railroad appealed and this court reversed, concluding that Judge Markey committed reversible error in refusing to consider extrinsic evidence concerning whether the parties intended to use the "across-the-fence" (ATF) method for determining the fair market value of the easements. (*Southern Pacific I*, *supra*, 74 Cal.App.4th at pp. 1245-1246.) As well, we held that Judge Markey's "unjustified undermining of Southern Pacific's planned case-in-chief, culminating in denial of the railroad's right to offer relevant evidence on the material issue of ascertaining the rent increase, if any, 'in accordance with the fair market value of the easement,' amounted to denial of a fair trial." (*Id*. at p. 1248.)

On remand the railroad challenged Judge Markey and tried to withdraw the stipulation, without success. UP also twice petitioned this court for relief; we denied both petitions and the Supreme Court declined to review our actions.

Retrial commenced in September 2002. Experts for both sides testified to the components of the ATF formula for determining rental value of the transportation corridor: John Donahue and Charles Seymour for the railroad and Neal Roberts and Peter Goodell for the pipeline company. There are four elements involved in the ATF rental calculation: First, the value of the land occupied by the easement and through which it travels is determined from sales values of adjoining nonrailroad corridors "across the fence" or in the vicinity of the railroad corridor. Next, the appraiser decides whether an enhancement or corridor factor reflecting the special value of a connecting corridor is merited. The third step is a determination of the percentage of the fee constituting the nonexclusive subterranean pipeline easement, that is, the actual underground and access rights conveyed. Finally, an appropriate rental rate or rate of return is selected. Thus, easement rent derived from the ATF

formula is the product of: Land Value x Enhancement Factor x Easement Percent of Fee x Rate of Return = Rent.

For the railroad Seymour testified to an average enhancement factor ranging from 1.55 to 1.65. Donahue asserted a range of 1.0 to 1.5, with an overall enhancement factor of 1.39. Donahue valued the underlying land encumbered by the easements at $127,338,809. He arrived at an average easement percentage of fee of 73.19 percent. Donahue opined that the appropriate rental rate to apply is 12 percent. He reached a rental conclusion of $15.6 million per year, rounded.

The pipeline experts opined that the value of the underlying land was $87,934,429. They also indicated that an enhancement factor of 1.15 should apply to the subject easements. On redirect examination, Roberts changed the prior opinion on the enhancement factor, now concluding it should be zero. Goodell explained that he became aware during trial, based on an examination of in-house UP sales authorization documents,[2] that UP had sold 21 of its own corridors at a zero or negative enhancement factor. Many transactions reflected sales prices with donated amounts and other noncash consideration.

Roberts and Goodell also expressed their opinion that the subject easements percentage of fee was 50 percent. This conclusion was "at the very high end of the range" that they thought was reasonable. Finally, SFPP's experts opined that the appropriate rental rate was 9 percent, giving an overall rental conclusion of $4,365,736 per year.

The court issued a detailed statement of decision valuing the land at $120 million as of January 1, 1994; setting the easement percent of fee at 40 percent; concluding the railroad failed to carry its burden to support a positive enhancement factor; and selecting a rate of return of 11 percent. Applying the ATF formula, the

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[2] These sales documents, which were admitted into evidence, had been provided to Seymour's appraisal company but he did not use them in deriving his own enhancement factor. Counsel for UP stipulated that these business records were in evidence "without exception," and the court could make "whatever rulings flow from th[e]se facts."

court concluded the fair market rent as of January 1, 1994, was $5.3 million (rounded), and of that amount, attributed $300,000 to the Alameda Corridor which was sold in December 1993. The court entered judgment accordingly and this appeal followed.

## II. DISCUSSION

A. *Disqualification Proceedings*

As a threshold matter, we address UP's contention that the trial court erred to its prejudice in declining to disqualify Temporary Judge Markey from presiding over the retrial of this case.

In 1995 the parties stipulated, pursuant to California Constitution article VI, section 21 and rule 244, to appointment of retired judge Markey as a temporary judge to "preside over the trial of the within matter until rendition of judgment," and to "hear and determine all post-trial motions relating to the judgment . . . and to act in said capacity until the conclusion of all matters herein which may be determined within the trial jurisdiction of the Superior Court." Compensation was set at $375 per hour. The trial court approved the stipulation, appointing Judge Markey "to hear and determine the above-entitled matter, until its final determination, including all post-judgement proceedings in the trial court." Twice the railroad sought on remand to disqualify Judge Markey, without success. First it brought a peremptory challenge pursuant to former Code of Civil Procedure section 170.6, subdivision (2)[3] and then it moved to withdraw from the stipulation under rule 244(g).[4]

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[3] This statute allows a party to peremptorily challenge a judge, court commissioner or referee for prejudice and specifically allows a motion following reversal on appeal of a final judgment "if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter." (Code Civ. Proc., § 170.6, subd. (a)(2), per Stats. 2003, ch. 62, § 22, which, among other matters, redesignated former subd. (2) as subd. (a)(2).) All further statutory references are to the Code of Civil Procedure unless otherwise specified.

[4] This rule provides in part: "A motion to withdraw a stipulation for the appointment of a temporary judge must be supported by a declaration of facts establishing good cause for permitting the party to withdraw the stipulation . . . ."

On appeal UP urges that the policy of affording litigants a "clean slate" after appeal, enshrined in former section 170.6, subdivision (2), is, as a matter of law, "good cause" to withdraw from a stipulation within the meaning of rule 244(g). We disagree, for several reasons.

First, the very policy which UP wishes to constitute good cause by its own terms does not apply to stipulated temporary judges. As currently constituted, section 170.6, subdivision (a)(1) pertains to a "judge, court commissioner, or referee *of any superior court of the State of California* . . . ." (Italics added.) When first enacted, it only pertained to judges "*of any superior, municipal or justice court of the State of California*." (Stats. 1957, ch. 1055, § 1, p. 2288, italics added.) Along the way, court commissioners and referees were added (Stats. 1967, ch. 1602, § 2, p. 3832; Stats. 1976, ch. 1071, § 1, p. 4815), and other amendments were enacted to reflect elimination of justice courts and the unification of municipal and superior courts (Stats. 1998, ch. 167, § 1, subd. (1); Stats. 2002, ch. 784, § 36, subd. (1)). In parallel fashion, section 170.5, subdivision (a) defines "judge" for purposes of sections 170 to 170.5 in an identical manner to mean "judges of the superior courts, and court commissioners and referees." Thus, certain judicial officers are recognized in section 170.6; temporary judges, stipulated to by the parties and authorized by California Constitution, article VI, section 21, are not.

Second, rule 244(g) is clear that good cause for withdrawing a stipulation is *not* established by a declaration that a ruling is based on error of fact or law. In *Southern Pacific I* we reversed for two reasons: because (1) the trial court committed reversible error in failing to look beyond the face of the agreements; and (2) the trial court's unjustified undermining of UP's planned case-in-chief amounted to denial of a fair trial. (*Southern Pacific I*, *supra*, 74 Cal.App.4th at pp. 1245-1246, 1248.) Although extremely serious, these were errors of law.

Third, to the extent UP is actually attempting to disqualify Judge Markey, rule 244(d), entitled "Disqualification," provides: "Requests for disqualification of temporary judges are determined as provided in Code of Civil Procedure sections

170.1, 170.2, 170.3, 170.4, and 170.5." As UP well knows, section 170.6 is omitted as a basis for disqualification. Judge Chiantelli summed it up nicely: "244 says when you want to go out and get your own judge, rather than the superior court judges, then you got to live by your choice. Because otherwise, they would have allowed you a 170.6."

B. *Enhancement Factor*

UP contends that an enhancement factor of anything less than 1.15 is contrary to the dictates of Evidence Code section 813 and therefore unsupported by appropriate expert evidence. Specifically, the railroad argues that the court relied solely on factual evidence, ignored expert opinions and thus impermissibly arrived at a factor of 1.0, which was "outside" the range of those opinions. We do not agree with UP's analysis and conclude that the enhancement factor was appropriately supported by expert opinion.

1. *Background*

Evidence Code section 813 dictates that the value of property may only be shown by (1) witnesses qualified to express such opinion; (2) the owner or spouse of the owner; and (3) knowledgeable officers, employees or partners designated by a corporation, partnership or association that is the owner. (*Id*., subd. (a)(1)-(3).) However, Evidence Code section 813 does not prohibit admission of any other admissible evidence for the limited purpose of enabling the trier of fact "to understand and weigh the testimony given under subdivision (a). (*Id*., subd. (b).) The limitations set forth in Evidence Code section 813 have been construed as intending "to prevent evidence, otherwise admissible, from being used to support a verdict outside the range of opinion testimony." (*State ex. rel. State Pub. Wks. Bd. v. Wherity* (1969) 275 Cal.App.2d 241, 249, italics omitted [eminent domain].)

Here the pipeline's experts revised their opinion on the enhancement factor downward, from 1.15 to 1.0, based on corridor sales transactions in which UP itself was a party and which revealed negative enhancement factors for certain sales.

UP first argues that the trial court relied solely and erroneously on factual evidence of the 21 corridor sales documents, admitted for the limited purpose of impeaching their expert. This argument ignores the reality of the pipeline experts' revised opinion, cited in the statement of decision. The sales documents which the court discussed are the very documents which caused the experts to change their mind. UP's argument does not withstand analysis. In any event, we review the correctness of the judgment, not the reasoning or grounds assigned for the ruling, and will affirm a judgment correct on any theory. (*Davey v. Southern Pacific Co*. (1897) 116 Cal. 325, 329-330.)

Second, UP contends the revised opinion could not serve as a proper basis for the decision because SFPP did not seek leave to augment its expert declaration. Section 2034, subdivision (f) governs the exchange of expert witness declarations during discovery. Among other things, the declaration must contain "[a] brief narrative statement of the general substance of the testimony that the expert is expected to give." (*Id*., subd. (f)(2)(B).) Upon objection, the trial court must exclude from evidence the expert opinion of any witness when the party unreasonably failed to submit an expert witness declaration. (*Id*., subd. (j)(2).) Our Supreme Court recently interpreted this subdivision as referring "to submission of a declaration that fully complies with the content requirements of subdivision (f)(2), including the requirement that the declaration contain" a brief statement of the general substance of the anticipated testimony. (*Bonds v. Roy* (1999) 20 Cal.4th 140, 145.) If a party desires to expand the scope of an expert's testimony beyond that stated in the declaration, the party most move under subdivision (k)(2) to amend the declaration " 'with respect to the general substance of the testimony that an expert previously designated is expected to give.' " (*Ibid*.)

In *Bonds v. Roy, supra,* 20 Cal.4th 140, the defense declaration indicated the expert would testify on damages, but at trial the defendant attempted to elicit testimony on the standard of care, a different, wholly undisclosed subject area. As this was well beyond the general substance of what had been described in the

declaration, the trial court properly excluded the testimony. (*Id*. at p. 149.) On the other hand, here SFPP's revised opinion did not stray from the general subject of valuation, and in particular the enhancement factor. In short, section 2034, subdivision (k) does not apply.

C. *Easement Percentage of Fee*

Similarly, UP attacks the trial court's ATF easement percentage of fee, arguing that 40 percent was not within the 50 to 73.19 percent testified to by the parties' experts. Again, we conclude that this determination is validly supported by substantial evidence.

*Introduction*

The land valuation component of the ATF formula is predicated on the assumption that the pipeline easement occupies the entire bundle of rights constituting the fee, namely surface, subsurface and aerial rights. However, as between the railroad and the pipeline, the railroad retains the air and surface rights. The pipeline's right is a nonexclusive right to run a pipeline underground, maintain it and install bumper stations "and the other things that go with it." Thus, the easement percentage of fee component seeks to establish what portion of the fee the pipeline easement actually occupies.

SFPP experts Roberts and Goodell referenced two approaches: the commonsense approach and the landlord's convention. The commonsense approach splits the fee into thirds, with a third allotted to each of aerial, surface and subterranean rights. On the other hand, the "landlord's or railroad's convention" assigns the subsurface 50 percent of the fee.

Roberts's and Goodell's analysis of physical occupancy revealed a use factor "as low as 8 percent" and "as high as 34 percent" depending on the width of the easement and the width of the pipe, and whether a commonsense (33 percent) or railroad convention (50 percent) use factor analysis was used. The railroad convention use factor yielded subsurface occupancies of 12 percent to 34 percent.

Roberts and Goodell also went into the field to ascertain the existence of subsurface, surface and aerial uses on the easements other than SFPP's pipeline use. Illustrating testimony with photographs, Roberts testified to a multitude of alternate uses as did Goodell. Surface uses include parking garages; lumberyards; railroad platforms; storage areas; loading docks; pedestrian walkways; equipment yards and landscaping, to name a few. Aerial uses include placement of billboards and power lines. And, in addition to the SFPP pipelines, UP allows other underground uses such as placement of fiber optic and telecommunication lines.

Roberts and Goodell ultimately picked the conventional 50 percent use fee, explaining that 50 percent was often used or agreed upon in the industry. In this regard they specifically alluded to a 1978 negotiation between a pipeline company, SPTC and another railroad in which both railroads agreed to a 50 percent use factor.

Setting the percentage at 40 percent instead of 50 percent, the trial court explained that discerning the percent of fee utilized by the pipeline easement was a "factual determination about the physical characteristics of the easement rather than one that requires expert testimony." While SFPP's experts did undertake a factual analysis of the physical characteristics of the easements, their use factor conclusion was based on more than that. They tested the two approaches—common sense and railroad convention—against the documented existence of potential and actual subsurface, surface and aerial uses; the actual physical occupancy of the subject easements; and the terms of the 1978 railroad-pipeline lease and what other appraisers were doing in the industry, ultimately arriving at a use factor conclusion of 50 percent. In other words, their conclusion was an expert opinion.

That being said, we also reiterate that this opinion was couched with a caveat, namely the SFPP experts were adamant in their qualification that 50 percent was *the maximum* reasonable percentage of occupancy factor. It was "at the upper range of appropriate use factors" for the subject easements. It was the highest "maximum" they could justify. Given this caveat, plus the range of actual physical occupancy use factors attested to, and the existence of a common sense approach which, although

not selected was not discarded as unworthy, we conclude that the 40 percent use factor was within the range of expert testimony provided by SFPP. Hence, regardless of the trial court's reasoning, which was based on its own factual calculations and assessment, the use factor chosen was supported by substantial evidence.

D. *Line Section 16*

The parties had one disagreement about the actual width of a segment of the pipeline easement that related to the ATF land value. Line Section 16 in Contra Costa County is a 19.204-mile pipeline segment running between Concord and San Jose. A memorandum of grant of easement, recorded in September 1994 and then again in January 1995 to correct certain errors, described the easement strip with reference to exhibit A and C.E. (chief engineer ) drawing 32503, both of which were attached to the memorandum and incorporated therein. UP prepared these attachments and sent them to SFPP for review and approval.

For purposes of the ATF analysis, the railroad ascribed a 10-foot width to the Line Section 16 easement, the pipeline company a five-foot width. Apparently the railroad expert relied on exhibit A, dated July 7, 1994, and initialed by an engineer for UP. Exhibit A sets forth a table of widths for the various portions of Line Section 16. The table assigns a width of five feet to each segment, although the legend to the exhibit indicates that there is a variance in the width of the easement at milepost 40.648. On the other hand, the pipeline company apparently relied on the C.E. drawing, revised July 7, 1994. That drawing indicates that the easement was five feet for a short distance where Line Section 16 paralleled Line Section 9, then changed to 10 feet at milepost 40.648 and remained at 10 feet for the rest of the distance.

The memorandum itself states that "[i]f the width of the easement has been reduced from the original 10 foot width to a narrower width specified on Exhibit A, such reduction in width is effective as of January 1, 1994." Although the court received extrinsic evidence to resolve the ambiguity as to which was the correct

width,[5] it concluded that the above provision on its face resolved the matter: "A narrower width is in fact stated on Exhibit A; that document, initialed by a Southern Pacific engineer, specifies that the easement is five feet wide for its entire length. Since Exhibit A governs in the event of any conflict with the C.E. drawing, the easement for Line Section 16 is hereby determined to be five feet wide." The court also noted as revealing UP's failure to elicit the testimony of the engineer who initialed exhibit A.

We do not concur with the trial court's assessment. While the above-quoted clause does point to exhibit A as recording potential reductions in easement width, its purpose is to indicate the effective date of any such change. The clause does not establish exhibit A as controlling over the C. E. drawing. Indeed, the recorded memorandum clearly states that the subject right-of-way is that "strip of land described on Exhibit A hereto *and on* the C. E. Drawing 32503, Sheet No. 25a." (Italics added.) Moreover, exhibit A itself is internally consistent. It clearly denotes a variance in the easement width at milepost 40.648, but the table of widths shows a uniform five-foot width for each segment of the 19.204-mile long easement. Further, it is precisely at milepost 40.648 on the C.E. drawing that the width of the right of way changes from five feet to 10 feet, where Line Section 16 ceases running parallel to Line Section 9, and the 10-foot width continues for the remainder of the section.

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[5] For example, Joseph Whitelaw for the pipeline company testified that he met with staff from the railroad in early 1994 for purposes of assigning a width and length to pipeline easements that had not been documented up to that time, or in instances of overlapping easements with parallel pipelines. Line Section 16 had been installed pursuant to a master agreement which called for a 10-foot easement. The negotiators reduced the width of the 10-foot easement to a five-foot right-of-way for .19 miles where it was directly parallel to another pipeline. After March 1994 Whitelaw was not involved "in the process of determining widths for any portion of the easement." However he was aware that the parties were trying "to make an effort to bring uniformity to the entire pipeline system. [¶] In other words, during the postbuild pipelines we used a 5-foot, 6-foot width in urban areas, a 10-foot width in the rural areas and an attempt to do the same thing on that. Whether they did or not I don't know."

The recorded memorandum of easement must be read and construed as a whole to give effect to each part, if reasonably practicable, with each clause and element helping to interpret the other and the whole. (Civ. Code, § 1641; *Ajax Magnolia One Corp. v. So. Cal. Edison Co*. (1959) 167 Cal.App.2d 743, 748.) Approaching the memorandum of easement as a whole, it is clear that the parties intended a change in width from five feet to 10 feet at milepost 40.648 and that the uniform five-foot width on exhibit A is a scrivener's error.

## III. DISPOSITION

We reverse that portion of the judgment assigning a five-foot width to Line Section 16 and direct the trial court to recalculate the ATF value, giving Line Section 16 a 10-foot width for 19.014 miles and a five-foot width for .19 miles.[6] In all other respects we affirm the judgment.

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Reardon, J.

We concur:

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Kay, P.J.

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Sepulveda, J.

[6] As stated above, Line Section 16 is 19.204 miles long. The short five-foot segment runs for .19 miles.